No. 07-1552

IN THE

Supreme Court of the United States

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SUPREME COURT, U.S.

IN RE: SPIEGEL INC., *et al.*,

Debtors.

BICO STUPAKOFF and RUSSELL JAMES,

Petitioners,

—v.—

OTTO DOOSAN LTD., OTTO SUMISHO INC. and OTTO (GmbH & Co KG),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioners, who in all three courts below did not rely on Fed. R. Civ. P. 60(b)(4) and repeatedly argued they did *not* contend the challenged confirmation order generally or its release and injunction provision specifically were void (so that none of the three lower courts addressed the voidness issue or Fed. R. Civ. P. 60(b)(4)), now may premise their petition for writ of certiorari on a voidness argument under Fed. R. Civ. P. 60(b)(4)?

II. Whether Petitioners fail to show a true conflict among the circuits regarding a party's need, after receiving actual notice of a bankruptcy court order releasing certain alleged claims of that party, to have acted within a "reasonable time" under Fed. R. Civ. P. 60(b)(4) in order to obtain relief from that order on the ground the party did not receive adequate advance notice of the challenged release?

III. Whether review by this Court would have no practical effect on this case because even if a known creditor of the debtors in these cases (the "*Debtors*") with a viable claim still could obtain relief from the Debtors' confirmation order based on inadequate notice, Petitioners waived their newfound Fed. R. Civ. P. 60(b)(4) argument, Petitioners were not known creditors of the Debtors, Petitioners' claims are barred by applicable statutes of limitation, and Petitioners have never sought to file late claims against the Debtors, which was the only relief that might have been available to Petitioners?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for Respondents Otto (GmbH & Co KG), Otto Doosan Mail Order Ltd. and Otto Sumisho, Inc., certifies the following:

Otto (GmbH & Co KG) is a partnership organized under German law and, therefore, is not a nongovernmental corporate party. As such, Otto (GmbH & Co KG) has no parent corporation and no stock.

Otto Doosan Mail Order Ltd. (n/k/a OTTO-Shopping Limited) is a corporation organized under the laws of South Korea. Otto Doosan Mail Order Ltd. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Otto Sumisho, Inc. (n/k/a Otto Japan Inc.) is a corporation organized under the laws of Japan. Otto Sumisho, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions included in and appended to the Petition for Writ of Certiorari, the pertinent provisions of Section 1141(a) of the Bankruptcy code, 11 U.S.C.A. § 1141 (a), Federal Rules of Bankruptcy Procedure, Rule 8002, and 28 U.S.C.A. § 1334 are reproduced in the Appendix hereto at 81a-86a.

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Otto (GmbH & Co KG) ("*Otto KG*"), Otto Doosan, Ltd., and Otto Sumisho, Inc. (together, "*Respondents*") submit this Brief in Opposition to the Petition for Writ of Certiorari ("*Petition*") filed by Petitioners, Bico Stupakoff and Russell James (collectively, "*Petitioners*").

STATEMENT OF THE CASE[1]

This appeal concerns Petitioners' attempt, more than three years after confirmation of the Debtors' reorganization Plan in the Spiegel chapter 11 cases, to obtain an unwarranted special exemption from the Release granted to Respondents that was incorporated in and integral to the Plan. The Release was approved by the Bankruptcy Court based, in part, on over $260 million of consideration delivered on behalf of Respondents to the Debtors, which enabled their creditors to recover almost (or totally) in full on their over $1.3 billion of claims. Petitioners acknowledged their claims against Respondents are barred by the Release's language and effectively conceded the Bankruptcy Court had jurisdiction and power to approve the Release generally. Rather, Petitioners argued the Release should not be enforceable against Petitioners because they allegedly were known creditors of the Debtors who received publication notice of the Release rather than actual notice by mail.

Petitioners waited at least seven months after receiving actual notice of the Release to seek

[1] Capitalized terms in the Statement of the Case have the definitions ascribed to such terms in the Statement of Facts.

relief. Specifically, Petitioners sought a declaratory judgment Petitioners were known creditors of the Debtors when their Plan was confirmed despite conceding: (a) Petitioners' alleged claims were not reflected on the Debtors' books and records; (b) Petitioners neither asserted nor filed their copyright claims against the Debtors (or anyone else including Respondents); and (c) until filing their declaratory judgment action, Petitioners had never appeared in the Debtors' chapter 11 cases. Moreover, although Petitioners could have sought to file late claims in the Debtors' chapter 11 cases and, if such claims were meritorious, would have recovered nearly or totally in full from the Debtors, Petitioners never pursued claims against the Debtors (even though Petitioners allege it was the *Debtors* that both failed to provide Petitioners with appropriate notice and were primarily responsible for the asserted "improper" use of Petitioners' photographs).

The Bankruptcy Court exercised its discretion not to entertain Petitioners' complaint seeking declaratory relief because Rule 60(b)(3), (5), or (6) governed the relief Petitioners requested. Further, the Bankruptcy Court found Petitioners' belated Complaint failed to satisfy Petitioners' burden under Rule 60(b), particularly as Petitioners failed to act for at least seven months after receiving notice of the Release. Alternatively, the Bankruptcy Court dismissed Petitioners' Complaint because it was based on allegations that were conclusory or that either could not lead to, or were inconsistent with, the inference Petitioners were "known creditors" of

the Debtors. The District Court and Second Circuit (unanimously) affirmed the Bankruptcy Court's decision.

Petitioners now suggest a basis for granting certiorari exists due to an alleged split among the circuits as to whether a court may deny a Rule 60(b)(4) motion based on voidness when the movant fails to seek relief within a reasonable time. Petitioners request is unfounded, however, because in all three courts below Petitioners never relied on Rule 60(b)(4), repeatedly stated they did not assert either the Confirmation Order or the Release were void, acknowledged they had to act within a reasonable time, and none of the three lower court's decisions addressed voidness or a request for relief under Rule 60(b)(4). Further, the circuit split alleged by Petitioners is nonexistent. Moreover, as there are multiple reasons Petitioners are not entitled to relief, there is no practical purpose for review by this Court. Consequently, Petitioners' request for certiorari should be denied.

STATEMENT OF FACTS

A. The Debtors' Chapter 11 Plan

On March 17, 2003, each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*") in the United States Bankruptcy Court for the Southern District of New York (the "*Bankruptcy Court*").

By order, dated May 25, 2005 (the "*Confirmation Order*"), the Bankruptcy Court, after notice

and a hearing (the "*Confirmation Hearing*"), confirmed the Debtors' chapter 11 plan (the "*Plan*"), which had been overwhelmingly accepted by the Debtors' thousands of creditors. A-117; *see* A-130 (¶ 16).[2] Notice of the Confirmation Hearing was provided by the Debtors, who had that obligation. Regarding that notice, the Confirmation Order included, *inter alia*, the following findings:

> I. *Adequate and sufficient notice of the Confirmation Hearing* and other requirements and deadlines, hearings and matters described in the Disclosure Statement Order *was provided in compliance with the Bankruptcy Code*, the Bankruptcy rules and the Disclosure Statement Order . . . . [T]he Confirmation Hearing Notice was mailed on or about April 5, 2005 to Holders of Claims against and Equity Interests in the Debtors and other parties in interest . . . . [T]he Confirmation hearing Notice was published, on April 15, 2005 in USA *Today* (National Edition), and on April 15, 2005 in *The New York Times* (National Edition), *The Wall Street Journal* (National Edition), and *The Globe and Mail* (National Edition). *No other or further notice of the Confirmation hearing was or is required.*

A-119-20 (emphasis added).

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[2] "A-___" refers to the documents listed in the parties' Second Circuit Joint appendix (volumes I and II). References to the documents attached to this Opposition Brief shall be in the form of "App. __." References to the documents attached to the Petition shall be in the form of "Pet. App. __."

The Plan's effective date (the "*Effective Date*"), on which the distribution of over $1 billion in cash and stock commenced, was June 21, 2005. A-705 (August Opinion ¶ I). As disputed claims against the Debtors were resolved over time, the amounts reserved for disallowed claims were freed up and distributed to holders of valid claims. Although for years Petitioners have had the opportunity to seek to share in such distributions, Petitioners inexplicably have failed to pursue that option.

The Plan, *inter alia*, incorporated a settlement (the "*SHI Settlement*") among various parties, including the Debtors and their official unsecured creditors' committee, on one hand, and Spiegel Holdings, Inc. ("*SHI*") and Otto KG, on the other hand. A-701-02 (*Id.* ¶ F). SHI was Spiegel Inc.'s majority and sole voting shareholder as well as an Affiliate[3] of Respondents. *Id.* Pursuant to the SHI Settlement, over $260 million of cash and other consideration was provided by and on behalf of Respondents and their Affiliates for the benefit of the Debtors and their creditors. *Id.* As a result, the Debtors' unsecured creditors, who held claims aggregating in excess of $1.3 billion, were projected to receive recoveries *exceeding 91%* of their claims. A-701 (*Id.* ¶ E). In exchange for these and other concessions, the Plan provided for SHI, Otto KG, and their respective Affiliates—including the other Respondents (collectively, the "*SHI Released Parties*")—to receive a release (the "*Plan Release*") from all

[3] As used herein, the terms "Affiliates" and "Affiliate" shall have the meanings ascribed to them in the Plan and the Bankruptcy Code.

claims arising on or before the Plan's Effective Date that, *inter alia*, the Debtors' creditors may hold against the SHI Released Parties related to the Debtors. A-103-05 (Plan § 13.4).

The Confirmation Order incorporated the Plan Release and enjoined the Debtors' creditors from asserting the released claims (collectively, the "*Release*" or "*Release and Injunction*") through, *inter alia*, the following findings and rulings:

- "The SHI Settlement plays an important part in the Plan, and absent the releases and corresponding injunction that are critical components of the SHI Settlement, the Released Parties . . . would not be willing to enter into the SHI Settlement."
- "The releases of non-Debtors under the Plan and related injunctions are fair to Holders of Claims and Equity Interests and are necessary to the proposed reorganization of the Debtors and the successful administration of their estates, . . . "
- "The Provisions of the Plan and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are non-severable and mutually dependent."
- "On the Effective Date, each Holder of a Claim . . . are [sic] hereby permanently enjoined from asserting any and all claims, . . . whether known or unknown . . . related to the Debtors . . . against any of the Released Parties."

- "Except as otherwise expressly provided in the Plan, this Confirmation Order or a separate order of this Court, the release provisions set forth in Article XIII of the Plan are approved."

A-134-37, A-146-47 (¶¶ 28, 32, 37, 54, 56).[4]

B. The Illinois Action

On January 30, 2004, Peter Rosenbaum Photography Corporation ("*Rosenbaum*") commenced an action (the "*Illinois Action*") solely on Rosenbaum's behalf against Respondents by filing a complaint in the United States District Court for the District of Illinois (the "*Illinois Court*"). A-706 (August Opinion ¶ J). Petitioners have alleged that "[t]he gravamen of [Rosenbaum's] Complaint was that [Respondents] unlawfully procured and published pictures taken by [Rosenbaum] without paying for the use of those pictures." A-548 (Complaint ¶ 20). Respondents contested these allegations and the Illinois Court's jurisdiction. In connection with the jurisdictional dispute, Rosenbaum took limited discovery from July 2004 through March 2005. A-906 (Motion for Leave to File Second Amended Class Action Complaint ¶ 7). Based on that discovery, in early November 2005, Rosenbaum sought (but did not obtain) leave of the Illinois Court to file an amended Complaint (the "*Proposed Class Complaint*"), A-206, that, *inter alia*, would have added a "class" of plaintiffs (*including Petitioners* as named plaintiffs) to the Illinois Action. A-706-07 (August Opinion ¶ N).

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[4] Petitioners do not contest that Respondents are included among the "Released Parties."

In early November 2005, as soon as all Respondents had been served in the Illinois Action, Respondents brought the Release to the Illinois Court's attention. A-706 (*Id.* ¶ M). On November 29, 2005, the Illinois Court stayed the Illinois Action, denied Rosenbaum leave to file the Proposed Class Complaint, and advised that no such litigation could proceed absent a ruling from the Bankruptcy Court that such litigation was not covered by the Release and Injunction. *Id.*[5]

C. The Rosenbaum Motion and Petitioners' Motion to Continue

On May 4, 2006, Rosenbaum filed in the Bankruptcy Court a motion (the "*Rosenbaum Motion*") seeking an order declaring Rosenbaum's claims asserted in the Illinois Action were not barred by the Release. A-707 (*Id.* ¶ O). On the eve of the June 22, 2006 hearing on the Rosenbaum Motion, Petitioners *first appeared* in the Bankruptcy Court by filing a motion seeking either to adjourn that hearing or to obtain a special finding that any ruling on the Rosenbaum Motion would not impact Petitioners' claims against Respondents (the "*Motion to Continue*"). A-707 (*Id.* ¶ P). On August 16, 2006, the Bankruptcy Court issued its Findings of Fact,

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[5] Quoting a document *not* in the Record, Petitioners observe that in November 2005, the Illinois Court warned Rosenbaum and prospective class plaintiffs not to pursue litigation in the Illinois Court without *first* obtaining relief from the Bankruptcy Court. *See* Petition at 7-8. Nevertheless, *Petitioners* inappropriately seek to rely on Rosenbaum's April 2006 motion *again* asking the Illinois Court for permission to file a class complaint as the point from which Petitioners' delay in seeking relief should be measured. *See id.* at 8.

Conclusions of Law, and Order Denying the Rosenbaum Motion and Petitioners' Motion to Continue (the "*August Opinion*"). A-698.

D. Petitioners' Complaint and Plan Modification Motion

On June 21, 2006, more than seven months after the Release was brought to the Illinois Court's (and Petitioners') attention, *see* A-1470 (November Opinion at 8), Petitioners filed a complaint ("*Complaint*") in the Bankruptcy Court seeking a declaratory judgment that the Release was unenforceable as to Petitioners. A-524. Respondents filed a motion to dismiss Petitioners' Complaint for failure to state a claim ("*Motion to Dismiss*"). A-742. In their response, Petitioners never asserted the Confirmation Order or Release were void and did not rely on Rule 60(b)(4).[6] *See* A-812.

On November 1, 2006, the Bankruptcy Court issued an opinion (the "*November Opinion*") granting Respondents' Motion to Dismiss and denying Petitioners' Plan Modification Motion. A-1475 (November Opinion at 13). The Bankruptcy Court exercised its discretion not to entertain Petitioners' Complaint for declaratory relief

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[6] On August 30, 2006, Petitioners filed a motion ("*Plan Modification Motion*") solely pursuant to Rule 60(b)(5) and (6), as made applicable herein by Bankruptcy Rule 9024, seeking to modify the Plan and Release to permit Petitioners to file a class complaint against Respondents (although no proposed complaint was tendered) so as to toll certain unidentified statute(s) of limitations that "may" be applicable to Petitioners' unspecified claims. *See* A-730; A-1408-09 (10/18/06 Transcript at 11-12); A-848 (Opposition to Plan Modification Motion).

because Rule 60(b)(3), (5), or (6) governed the relief Petitioners requested. Further, the Bankruptcy Court found Petitioners' belated Complaint failed to satisfy Petitioners' burden under Rule 60(b), particularly as Petitioners failed to act for at least seven months after receiving notice of the Release. Alternatively, the Bankruptcy Court dismissed Petitioners' Complaint because it was based on allegations that were conclusory or that either could not lead to, or were inconsistent with, the inference Petitioners were "known creditors" of the Debtors. The November Opinion did not consider or rule upon voidness or Rule 60(b)(4).

E. Petitioners' Appeals

Petitioners appealed the November Opinion without asserting voidness or Rule 60(b)(4). *See* Brief of Appellants Bico Stupakoff and Russell James, S.D.N.Y. No. 03-11540 (BRL), dated Dec. 15, 2006 (appealing dismissal of adversary proceeding) (*"Petitioners' District Court Brief"*). On February 28, 2007, the United States District Court for the Southern District of New York (the *"District Court"*) affirmed the Bankruptcy Court's November Opinion. Pet. App. at 6a. The District Court found dismissal of Petitioners' Complaint under Fed. R. Civ. P. 12(b)(6) was appropriate because Petitioners "have not sufficiently pled that they were known creditors of Spiegel upon confirmation of the Plan." and instead merely pled "conjecture or speculation." *Id.* at 8a-9a. The District Court further noted Petitioners had no chance of satisfying their burden of showing the Bankruptcy Court abused its discretion by denying relief under Rule 60(b) and the Declaratory

Judgment Act. *See id.* at 9a n. 3. The District Court never considered or ruled upon Rule 60(b)(4) or voidness.

On March 13, 2008, the United States Court of Appeals for the Second Circuit issued a Summary Order (the "*Opinion*") unanimously affirming the District Court's judgment. *See id.* at 1a. The Second Circuit found the Bankruptcy Court did not abuse its discretion in either denying Petitioners' request for declaratory judgment as "untimely" or as a "collateral attack on the Plan" governed by Rule 60(b)(3), (5), or (6) that was not brought within a "reasonable time." *Id.* at 3a-4a. The Second Circuit did not rule based upon Rule 60(b)(4) or voidness.

REASONS FOR DENYING THE PETITION

I. PETITIONERS MISREPRESENT THE ISSUE PRESENTED BELOW TO FABRICATE A BASIS FOR REVIEW BY THIS COURT.

According to Petitioners, they "ask the Court to review" whether "the court of appeals departed from fundamental principles of due process in endorsing the minority position that an action seeking relief from a void judgment must be brought within a reasonable time." Petition at 11-12. Indeed, the entire focus of the Petition is the newfound assertion that Petitioners sought relief from a "void" judgment under Rule 60(b)(4). Yet, that challenge was not litigated in (or decided by) any of the three courts below and was

not even mentioned by Petitioners on appeal until Petitioners' Reply in the Court of Appeals.

A. When Petitioners Filed Their Complaint, The Confirmation Order And Release Provision Were No Longer Subject To Challenge.

Petitioners never challenged and effectively conceded that the Bankruptcy Court had jurisdiction and power to approve the Release. As to jurisdiction, 28 U.S.C. § 1334(b) provides "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." As to power, governing bankruptcy law permits approval of a nondebtor release such as the Release.[7] *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan.") (citation omitted).

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[7] The broad scope of the Bankruptcy Clause, contained in article I, section 8 of the Constitution, is well-established. *See* U.S. Const. art. I, § 8, cl. 4. Pursuant to the Bankruptcy Clause, Congress enacted in the current Bankruptcy Code: (i) section 105(a), entitled "Power of court," which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"; (ii) section 1123(b)(6), entitled "Contents of plan," which provides that "a plan may—include any other appropriate provision not inconsistent with the applicable provisions of this title"; and (iii) section 1141(a), entitled "Effect of confirmation," which provides that "the provisions of a confirmed plan bind . . . any creditor." 11 U.S.C. §§ 105(a), 1123(b), 1141(a).

Even, however, if the Bankruptcy Court had lacked such jurisdiction and power, Petitioners no longer could have challenged them directly. First, any such challenge would have been barred by *res judicata*. *See Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) (*res judicata* precludes collateral attack on final nonappealable confirmation order based on assertion the order should not have included a release of a non-debtor's guaranty obligation); *Republic Supply Co. v. Shoaf*, 815 F. 2d 1046, 1054 (5th Cir. 1987) (same). Second, such a collateral attack also would have been barred by the equitable mootness doctrine. *See, e.g., In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 145 (2d Cir. 2005) (rejecting appeal of improperly approved non-debtor plan release based on equitable mootness, reasoning, in part, that "[e]ven if we could carve out appellants' claims from the non debtor releases, we would not do so. If appellants' claims are substantial (as they urge), it is as likely as not that the bargain struck by the debtor and the released parties might have been different without the releases") (citation omitted).

Additionally, Petitioners' newfound argument ignores that in these bankruptcy cases, Petitioners rely not on Rule 60(b) in isolation, but on Federal Rule of Bankruptcy Procedure 9024 ("*Rule 9024*"). Rule 9024 provides that "Rule 60 F. R. Civ. P. applies in cases under the [Bankruptcy] Code except that . . . (3) a complaint to revoke an order confirming a plan only may be filed within the time allotted by § 1144 or § 1330." Section 1144 of the Bankruptcy Code exemplifies the paramount importance of finality

in bankruptcy cases by providing that a plan confirmation order may be revoked "if and only if such order was procured by fraud," and even then, only if such revocation is sought by a motion filed "before 180 days after the date of entry of the order of confirmation." 11 U.S.C. § 1144. Since seeking a declaration the Confirmation Order was void would have amounted to seeking revocation of the Plan, any such attempt by Petitioners would have been prohibited under both section 1144 and Rule 9024 because Petitioners did not allege fraud and more than 180 days had passed since entry of the Confirmation Order.

Accordingly, until now (when Petitioners are trying to concoct a basis to seek certiorari), Petitioners repeatedly stated, when addressing Respondents' Motion to Dismiss Petitioners' Complaint and in the related appeals, that Petitioners did *not* assert the Confirmation Order generally or the specific Release provision contained therein were void or that Rule 60(b)(4), made applicable herein by Rule 9024, was the basis for Petitioners' argument:

- "[Petitioners] are not seeking to void, rescind or otherwise alter the confirmation order. Rather they are seeking a declaration that, because of the lack of notice and due process afforded, the Release and Injunction cannot be enforced against them." A-830 (Petitioners' Bankruptcy Court Brief at 19).
- "[Petitioners] do not seek a declaration that a plan provision is void *ab initio*. Rather they seek a far narrower deter-

mination that a specific plan provision cannot be enforced against them due to lack of notice." Petitioners' District Court Brief at 12.

- "Nothing in this case suggests that . . . Fed. R. Civ. P. 60(b) is applicable to [Petitioners'] constitutional claims, ..." Reply Brief of Appellants Bico Stupakoff and Russell James, S.D.N.Y. No. 03-11540 (BRL), dated Jan. 8, 2007 (appealing dismissal of adversary proceeding), at 9 (*"Petitioners' District Court Reply Brief"*).

- "And while the Second Circuit [in *Whelton*] concededly did apply the 'reasonable time' limitation codified at Fed. R. Civ. P. 60(b)(4), it did so based upon the fact that ECMC sought to declare a confirmed plan provision void *ab initio*. [Petitioners,] *by contrast, solely seek* to declare the Release and Injunction unenforceable against those parties that did not receive constitutionally sufficient notice of these provisions." *Id.* at 15 (emphasis added).

- "[Petitioners] properly proceeded by way of adversary proceeding and were in no way required to comply with the provisions of . . . Fed. R. Civ. P. 60(b)." *Id.* at 16.

- "The relief being requested by [Petitioners] is far less drastic than that sought in *Whelton*. [Petitioners] *do not seek a declaration that a plan provision is void ab initio.*" App. at 31a-32a (Petitioners'

Second Circuit Brief at 22) (emphasis added).

- "Nor have [Petitioners] sought to attack the Confirmation Order generally as to all parties—only its applicability to parties that did not receive constitutionally sufficient notice." App. at 67a-68a (Petitioners' Second Circuit Reply at 10).

Correspondingly, the Court of Appeals did not understand Petitioners to have sought relief under Rule 60(b)(4). *See* Pet. App. at 4a. Thus, in part because Petitioners did *not* assert voidness, the Court of Appeals *rejected* Petitioners' attempt to rely by analogy on *Whelton v. Educational Credit Management Corp.*, 432 F.3d 150 (2d Cir. 2005), which found that Rule 60(b)'s requirement that a motion be brought within a "reasonable time" was flexible when the motion was a request "to declare one of the provisions of a confirmed plan void." *See* Pet. App. at 4a (quoting *Whelton*, 432 F.3d at 156 n.2). Similarly, Respondents did not understand Petitioners to have relied on Rule 60(b)(4). *See* App. at 88a (Respondents' Second Circuit Brief at 14) ("[T]he fact [Petitioners] sought relief under a Rule 60(b) subsection *other than Rule 60(b)(4)* does not alter the conclusion Rule 60(b) controls.") (emphasis added).

B. Petitioners' Argument Below Was Limited To The Impact Of Allegedly Insufficient Notice

What Petitioners did argue below was that Rule 60(b) did *not* apply to Petitioners' Complaint and, therefore, Petitioners could rely exclusively on the Declaratory Judgment Act to

obtain limited relief from the Release without addressing Rule 60(b)'s requirements.[8] *See* A-829-31; App. at 61a-62a. Moreover, in all the motion practice and related appeals below, Petitioners argued the declaratory relief sought was merely that the Release was not enforceable against them, not that the Confirmation Order or Release was void. *See* Argument I.A. Thus, in the Bankruptcy Court and District Court, Petitioners never relied on Rule 60(b)(4) to defeat Respondents' motion to dismiss the Complaint.[9]

Even in the Court of Appeals, Petitioners' principal brief *never* mentioned Rule 60(b)(4) and only mentioned Rule 60(b)(5) and (6) in connection with Petitioners' Motion to Modify the Plan, *not* concerning dismissal of Petitioners' Complaint. *See* App. at 10a. Indeed, Petitioners did not even mention Rule 60(b)(4) or a voidness argument until their Court of Appeals Reply. Even then, however, Petitioners qualified their argument by stating Petitioners "have not taken the position that the Release and Injunction is void on its face or as to all creditors. Rather, they

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[8] Petitioners did rely on Rule 60(b)(5) or (6) for their Plan Modification Motion, which sought temporary relief solely so Petitioners could file a placeholder complaint in the Illinois Litigation. A-736-37 (¶21). Even then, however, Petitioners relied on subsections of Rule 60(b) *other than* Rule 60(b)(4) and as to which Petitioners conceded the "reasonable time" requirement applied. *See id.*

[9] In the District Court, Petitioners' principal brief in the appeal of dismissal of Petitioners' Complaint never mentions Rule 60(b) and Petitioners' Reply mentions Rule 60(b)(4) only in the context of summarizing certain cases, not as the basis for Petitioners' appeal. *See* Petitioners' District Court Brief; Petitioners' District Court Reply Brief.

have asserted that these provisions are unenforceable against the parties that did not receive constitutionally sufficient notice." App. at 64a. Further, in their Reply, Petititioners did not argue they were not subject to the reasonable time limitation of Rule 60(b), but merely contended they had acted *within* a reasonable period because Rule 60(b)(4) was "lenient":

> the [Petitioners'] request was timely made in the context of Rule 60(b)(4). The one year limit of Rule 60 does not apply to a voidness challenge challenge under Rule 60(b)(4). *Rather the relief sought must be made only within a reasonable time.* . . . A period of a few extended months is not an extended period of time which should obviate relief under Rule 60(b).

Id. at 65a-66a (citations omitted) (emphasis added).[10] Consequently, Petitioners' arguments below provide no basis for granting certiorari.

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[10] Correspondingly, Petitioners stated that "[a] review of a denial of a Rule 60(b) motion is subject to an abuse of discretion standard." App. at 40a (citation omitted). Notably, Petitioners' statement is not limited to Rule 60(b)(5) and (6). Regardless, at a minimum, Petitioners acknowledge a court has discretion to fashion the appropriate remedy when applying Rule 60(b)(4). *See, e.g.*, Petition at 15 n. 7, 18.

II. CERTIORARI IS UNWARRANTED HERE BECAUSE THE ISSUE PETITIONERS PRESENT WAS NOT CONSIDERED BY THE SECOND CIRCUIT AND IS NOT THE SUBJECT OF A "CIRCUIT SPLIT."

A. Petitioners Mischaracterize The Ruling Below.

In an attempt to create an issue for this Court when none exists, *Petitioners assert* the Second Circuit: (a) held "the reasonable time limitation applies to voidness challenges," Petition at 13; and (b) affirmed the District Court's decision "based upon the conclusions that a bankruptcy court has discretion under Rule 60(b) of the Federal Rules of Civil Procedure to deny relief to a creditor who does not seek relief from an allegedly void plan of reorganization within what the bankruptcy court believes to be a 'reasonable time.' " Petition at 3-4.

The circuit court held no such thing; rather, it found the Bankruptcy Court had not abused its discretion when rejecting Petitioners' request for a declaratory judgment on two grounds. First, the circuit court found the Bankruptcy Court had discretion to determine the propriety of hearing a declaratory judgment request, and that discretion included considerations of timeliness. Pet. App. at 3a-4a. Second, the circuit court found the Bankruptcy Court had discretion to dismiss Petitioners' request for declaratory judgment as untimely under Rule 60(b) "as discussed above." What the circuit court had "discussed above" was Petitioners' argument that the Release was not enforceable as to Petitioners

because they allegedly had not received proper notice. *Id.* at 3a. The circuit court found Petitioners' request was likely governed by Rule 60(b)(3), and acknowledged that "Appellants allege" the Complaint properly was governed by Rule 60(b)(5) "and/or" (6). *Id.* The circuit court, therefore, was ruling on the basis of either the Rule 60(b) subsection the circuit court thought governed the request, *i.e.*, 60(b)(3), or the subsections Petitioners alleged applied, *i.e.*, Rule 60(b)(5) or (6). *None* of these subsections was Rule 60(b)(4). Indeed, the circuit court's Opinion makes no reference to Rule 60(b)(4) and never discusses voidness.

Not surprisingly, therefore, Petitioners' phrasing of the issue presented here seeks to circumvent the fact the court below simply did not rule on it. Specifically, Petitioners oddly frame the issue presented as whether "an otherwise unenforceable order [may] become enforceable against parties whose rights the order purports to extinguish because those parties did not affirmatively move to enforce their rights within the 'reasonable time' contemplated by Federal Rule of Civil Procedure 60(b)." Petition at 4. Notably, this convoluted recitation of the question presented fails to use the word "void" or refer to Rule 60(b)(4).[11] Yet, the actual issue, were it in fact presented in this appeal, would have been whether an allegedly void order may be challenged under Rule 60(b)(4) in perpetuity. Since, contrary to

[11] Further, as framed, the question *presumes* Petitioners failed to act within the "reasonable time" prerequisite of Rule 60(b). Moreover, Petitioners ignore that a court order is not unenforceable unless a court first has found the order is unenforceable. *See* n. 14 *infra*.

Petitioners' repeated assertions, the Second Circuit neither considered nor ruled on whether a motion to vacate under Rule 60(b)(4) must be made within a reasonable time or whether a reasonable time limit applies to voidness challenges, no basis for certiorari exists here.

B. Petitioners Mischaracterize The Rulings Of The Second Circuit And Other Circuit Courts Regarding Rule 60(b)(4) To Manufacture A Nonexistent "Circuit Split."

Petitioners describe the so-called "majority" of circuit courts as permitting a Rule 60(b)(4) motion to be made at any time: "notwithstanding the 'reasonable time' limitation of Rule 60(b), at least seven circuits have held that a Rule 60(b)(4) motion to set aside a void judgment may be brought 'at any time.'" Petition at 21. Contrary to Petitioners' assertion, however, current Second Circuit law is consistent with this "majority" view.

Petitioners assert the Second Circuit has "repeatedly made clear that district courts retain discretion to deny requests for relief they determine were not made within a reasonable time," relying on cases such as *Central Vermont Public Service Corp. v. Herbert*, 341 F.3d 186 (2d Cir. 2003). Petition at 19. Yet, *Central Vermont* imposed no time limit regarding a voidness challenge. In *Central Vermont*, the Second Circuit reversed the District Court's decision that movants' Rule 60(b)(4) motion challenging a bankruptcy court injunction was untimely. The Second Circuit held the motion was timely,

although brought more than four years after the movant learned of the challenged injunction, reasoning as follows:

> Even though Rule 60(b) states that '[t]he motion must be made in a reasonable time,' courts have been exceedingly lenient in defining the term 'reasonable time,' with regard to voidness challenges. In fact, it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void 'may be made at any time.' "

341 F.3d at 189 (citation omitted). The other Second Circuit cases cited by Petitioners follow a similar approach. *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 190-91 (2d Cir. 2006) (Rule 60(b)(4) motion made more than five years after the judgment was entered was timely "whether or not they theoretically had the option" of bringing the motion earlier); *Whelton*, 432 F.3d at 156 n.2 ("reasonable time" limitation of Rule 60(4)(b) has been interpreted permissively, and for all intents and purposes, may be made at any time).[12] Thus, the Second Circuit decisions cited by Petitioners do not conflict with the standard Petitioners assert is applied in the

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[12] The only Second Circuit cases actually finding Rule 60(b)(4) motions to be untimely involved circumstances akin to waiver. In effect, when a party previously made a Rule 60(b) motion without raising Rule 60(b)(4) and then more than a year later made another Rule 60(b) motion raising Rule 60(b)(4) for the first time, the Rule 60(b)(4) motion may be denied as untimely. *See State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004); *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997).

"majority" circuits. *See* cases cited in Petition at 16-17.[13]

In a further misguided attempt to distinguish Second Circuit precedent, Petitioners concoct three "rules" of the "majority of courts" for application of Rule 60(b)(4). *See* Petition at 17-18. Petitioners offer no citations to support their assertion that all three such "rules" are the law in a majority of circuits. Further, Petitioners fail to acknowledge that established law in the Second Circuit is compatible with such "rules" to

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[13] Petitioners also assert that the First and Eighth Circuits take a "minority" view and require that Rule 60(b)(4) motions be filed within a reasonable time. The cases relied on by Petitioners offer no meaningful support for this argument. *See Baldwin v. Credit Based Asset Servicing & Securitization*, 516 F.3d 734, 737 (8th Cir. 2008) (finding that motion was timely under Rule 60(b)(4) as opposed to under bankruptcy provision requiring motion to be made within 10 days of judgment; mention of "reasonable time" dictum); *Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 67 (1st Cir. 2003) (stating "[s]ince a void judgment is a legal nullity, there is ordinarily no need to request relief from it (and, thus, no time limit within which to request relief)" and emphasizing litigants were engaged in a "course of conduct designed to evade legal responsibility"). As to the only circuit possibly utilizing the so-called "minority" view, the Sixth Circuit, petitioners can only cite to *unpublished* decisions containing little analysis. *See Blachy v. Butcher*, No. 03-2079, 2005 WL 843905, at *5 (6th Cir. Apr. 12, 2005) (unpublished decision ruling that a motion citing a mélange of grounds made under Rule 60(b)(4), (5), and (6) was untimely after three years); *Manohar v. Massillon Community Hosp.*, No. 99-3481, 2000 WL 302776, at *1 (6th Cir. Mar. 17, 2000) (unpublished decision affirming denial of Rule 60(b)(4) motion as untimely after five years); *Richard v. Allen*, No. 95-3451, 1996 WL 102419, at *1 (6th Cir. Mar. 7, 1996) (unpublished decision affirming denial of Rule 60(b)(4) motion as untimely after almost four years).

the extent relevant here. Indeed, Petitioners incorrectly imply Second Circuit law is not compatible.

The first of Petitioners' three "rules," that the reasonable time requirement does not apply to Rule 60(b) motions alleging a judgment is void, is simply a rehash of the so-called "majority" view of circuit courts. As demonstrated above, this "rule" is consistent with the Second Circuit's approach that "for all intents and purposes, a motion to vacate a default judgment as void may be made at any time." *See, e.g., Central Vermont*, 341 F.3d at 189 (citations and internal quotations omitted).

Petitioners' second "rule," that courts have no discretion in granting relief from a void judgment under Rule 60(b)(4), is either redundant to the first "rule" or misleading, as Petitioners concede courts have discretion in fashioning a remedy under Rule 60(b)(4), particularly in the bankruptcy context. *See, e.g.*, Petition at 15 n.7, 18. Argument III. D. below amplifies on a court's flexibility in granting any such remedy.

Petitioners' third "rule" is that a Rule 60(b) motion is not the only avenue to prevent enforcement of void judgments. The only support Petitioners offer for this vague proposition is a scattershot collection of four cases, only one of which is at the appellate level, and none of which even addresses whether the parties raised Rule 60(b), let alone its application. *See In re Unioil*, 948 F.2d 678, 683-84 (10th Cir. 1991) (without discussion of Rule 60(b), finding creditor that did not receive notice was not bound by reorganization plan); *In re Spring Valley Farms, Inc.*, 68

B.R. 756, 759-61 (Bankr. N.D. Ala. 1986), *aff'd*, 85 B.R. 593 (N.D. Ala. 1988), *aff'd*, 863 F.2d 832 (4th Cir. 1989) (without discussion of Rule 60(b), finding plaintiffs seeking to add debtor as a defendant to existing nuisance action were not barred by confirmed plan because plaintiffs did not receive notices required by Bankruptcy Rule 2002); *In re Chance Industries, Inc.*, 367 B.R. 689, 707-10 (Bankr. D. Kan. 2006) (without discussion of Rule 60(b), finding claim of personal injury plaintiff injured after plan was confirmed did not come within category of barred claims); *In re Newstar Energy of Texas, LLC*, 280 B.R. 623, 626-27 (Bankr. W.D. Mich. 2002) (without discussion of Rule 60(b), finding creditor that did not receive notice of plan of reorganization was not bound by plan). These cases spanning twenty years and disparate jurisdictions hardly constitute even a pattern, much less a "rule." Further, there is substantial case law to the contrary.[14]

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[14] *See In re Hudson*, 260 B.R. 421, 443 (Bankr. W.D. Mich. 2001) ("Some reported opinions seem to declare that a chapter 13 plan that is confirmed without proper notice is ineffective. . . . Even assuming a confirmation order is defective, whether because of defective notice or any other reason, it remains binding until procedures are utilized to successfully revoke or obtain relief from the order. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134 (1938) (even assuming jurisdiction is nonexistent, a court order remains binding unless subsequently set aside).") (applying Rule 60(b)); *In re Swanson*, 312 B.R. 153, 157-58 (Bankr. N.D. Ill. 2004) (Rule 60(b) must be utilized to obtain relief from a confirmation order based on inadequate notice); *In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 543 (Bankr. M.D. Tenn. 1983) ("Once a confirmation order becomes final, the only remedy available is to have the order set aside pursuant to Rule 60 of the *Federal Rules of Civil Procedure*.") (footnotes omitted).

Finally, nothing in Second Circuit cases directly conflicts with the four decisions Petitioners cite.

Hence, Petitioners mischaracterize Second Circuit and other circuit caselaw in an attempt to manufacture a non-existent "split" between the Second Circuit and the so-called "majority" view to create the impression there is an issue for this Court to address. Yet, not only did the ruling below not impact existing Second Circuit law applicable to Rule 60(b)(4) and voidness challenges, but there is no conflict between Second Circuit law and the "majority" view described by Petitioners. Petitioners fail to provide any basis for granting certiorari.

III. GRANTING THE WRIT PETITIONERS REQUEST WOULD SERVE NO PRACTICAL PURPOSE BECAUSE THERE ARE MULTIPLE INDEPENDENT BASES FOR DISMISSAL OF PETITIONERS' LAWSUIT.

Even where a clear conflict exists among circuits, certiorari may be denied if resolution of the conflict would not impact the ultimate outcome of the case. *See* Gressman, Geller, et al., *Supreme Court Practice* (9th ed. 2007) at 248 (citing *Sommerville v. U.S.*, 376 U.S. 909 (1964) (despite conflict as to whether Federal or state law applied, certiorari was denied because petitioner would be liable under either alternative)). Accordingly, even if Petitioners had asserted below a Rule 60(b)(4) argument based on voidness (which Petitioners did not), and if the Second Circuit had rendered a decision based on that argument (which the circuit court did not), and if there were a split among the circuits on that issue

(which there is not), certiorari still would be inappropriate here because resolution of the conflict alleged by Petitioners would not alter the ultimate outcome of their litigation against Respondents.[15]

A. Petitioners No Longer May Seek A Remedy Based On An Allegedly Void Order.

Petitioners' failure to raise Rule 60(b)(4) below until their Second Circuit Reply (and even then only in a qualified fashion) signifies that Petitioners failed to act within a reasonable time and waived any ability to rely on Rule 60(b)(4). *See Beller & Keller*, 120 F.3d at 24 (movant's failure to raise Rule 60(b)(4) voidness argument in first motion to vacate signified movant "could reasonably be held to have waived his right to raise the argument); *Planet Corp. v. Sullivan*, 702 F.2d 123, 125 (7th Cir. 1983) (second motion to vacate filed one year after judgment was entered and raising, *inter alia*, new voidness argument, was not filed within a "reasonable time"). Indeed, in *Page v. Schweiker*, 786 F.2d 150 (3d Cir. 1986), the fact the appellant first raised a Rule 60(b)(4) argument in the circuit court after making only a Rule 60(b)(1) challenge of an allegedly void order in the district court was fatal:

> [appellant] appeals from the order denying her Rule 60(b) motion, not from the judgment that she now contends is void. There is no

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[15] A primary reason Petitioners could not succeed is that their underlying claims against Respondents are meritless. Nevertheless, this is not the forum to address that lack of merit.

> doubt as to the district court's power to issue the order now before us, though—of course—that order may be erroneous. An order is not void because it is erroneous.

Id. at 153 (citation omitted). Accordingly, Petitioners may not rely on Rule 60(b)(4) now.

B. Petitioners Were Unknown Creditors Of The Debtors And Received The Required Publication Notice.

Petitioners argue the Release and Injunction are not enforceable against Petitioners because they were known creditors of the Debtors entitled to, but who did not receive, actual notice of confirmation of the Plan. Petitioners concede the publication notice they received was sufficient for unknown creditors. Hence, an essential element for Petitioners' ultimate success is establishing they were *known* creditors.

Yet the Bankruptcy Court and District Court each found that Petitioners' Complaint failed to state a claim that they were known creditors and dismissed the Complaint (and affirmed that dismissal) on that basis. *See* Pet. App. at 23a-24a; 8a-9a. Further, the Second Circuit affirmed the District Court's judgment and Petitioners seek no review here of any determination they were not known creditors of the Debtors. *See id.* at 5a. Consequently, Petitioners cannot establish that they were known creditors of the Debtors and, therefore, no purpose would be served by granting Petitioners' petition for certiorari.

C. Petitioners Are No Longer Entitled To Pursue Their Copyright Claims Because The Statutes Of Limitation On Their Claims Have Run.

Petitioners concede the statutes of limitation applicable to their claims likely have run. *See* Petition at 10 n. 4; A-730 (Plan Modification Motion (which was filed almost one year ago by Petitioners on the basis of allegedly imminent expiration of applicable statutes of limitation)). Certainly, there is no basis for Petitioners' unsupported assertion that their unsuccessful Plan Modification Motion somehow "equitably tolls any statutes of limitation that may be applicable to their claims against" Respondents. *See* Petition at 10 n. 4. Petitioners substantially delayed in initially seeking relief, and never made a meaningful effort to expedite resolution of Petitioners' Complaint. Moreover, they failed to make a coherent argument in the Bankruptcy Court regarding potential expiration of applicable statutes of limitation. *See* Pet. App. at 13a. Thus, there is no reason for this Court to entertain Petitioners' certiorari petition, as it is a futile endeavor.

D. Any Success Under Rule 60(b)(4) Would Not Entitle Petitioners To A Remedy Against Respondents.

As demonstrated by the cases relied upon by Petitioners, even if Petitioners overcame all the hurdles referenced above, Petitioners' entitlement to a remedy and the nature of any remedy would be determined by the Bankruptcy Court

based on the circumstances.[16] *See, e.g., City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953) ("We hold that publication of the bar order in newspapers cannot be considered 'reasonable notice' to New York *under the circumstances of this case.*") (emphasis added); *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620, 623 (10th Cir. 1984) ("*Under the circumstances presented in this case,*", i.e., after the debtor "had already fully distributed the payable assets" to the class of claims in which the unnoticed creditor's claim belonged, the creditor's claim may be pursued against the debtor as if no discharge had occurred.) (emphasis added); *United States v. One Toshiba Color Television*, 213 F.3d 147, 158-59 (3d Cir. 2000) ("[O]ur holding is not to be construed as allowing a petitioner to sit on his or her rights. It is true that if a court is able to determine that a prior judgment is indeed void, it should declare it as such, but that does not mean that other remedies, such as the actual return of property or its cash value, are immune from defense of waiver or laches. . . . *It is in the pursuit of his remedies that [movant's] delay, if any will become an issue.*") (emphasis added); *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1451 (9th Cir. 1985) ("Our holding

[16] Petitioners themselves acknowledge that in a "mega-case" such as this, the Bankruptcy Court would have significant discretion in fashioning any relief that might be warranted: "the appropriate remedy for due process violations affecting creditors whose claims are small in the context of the plan as a whole will often be to hold that the claims of the improperly notified creditors are not discharged or subject to the plan, rather than revoking or vacating the plan as a whole." Petition at 15 n. 7.

that the [cash collateral order] is void to the extent it [abridged the rights of a secured creditor who did not receive notice] does not, therefore, require that [the secured creditor] be placed in the precise position it would have occupied had [the order not been approved]." Instead, the court only granted the secured creditor limited relief to "protect its interest *without disturbing the myriad of transactions that occurred in reliance on the [cash collateral order]*.").[17]

Here, as the Bankruptcy Court made clear, all such circumstances militate strongly against any court granting Petitioners the relief they seek, the right to pursue Respondents unfettered by the Release. First, in reliance on the Release, over $260 million of consideration was provided to the Debtors on Respondents' behalf that enabled the Debtors' creditors to be paid nearly

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[17] *See In re Columbia Ribbon & Carbon Mfg. Co.*, 54 B.R. 714, 721 (Bankr. S.D.N.Y. 1985) ("No-notice creditors may file a claim entitled to *pari passu* distribution status at anytime *before the final distribution is made.*") (emphasis added); *In re C.S.T. Construction Co.*, 21 B.R. 840, 844 (Bankr. N.D. Ill. 1982) ("Circumstances such as an already confirmed Plan, a partially or wholly effectuated Plan, or delay on the part of the creditor in requesting leave to file a Proof of Claim may militate in favor of the conclusion that justice does not require nor allow the late filing of a claim [by a known creditor who did not receive actual notice]. The Supreme Court's decision in *City of New York v. New York, N.H. & H. Railroad* does not provide direction for such cases."); *In re Rideout*, 86 B.R. 523, 530 (Bankr. N.D. Ohio 1988) (court evaluates alternative remedies for inadequate notice of plan confirmation, applies Rule 60(b), and states that a critical factor "*setting this case apart, is the fact that [the creditors] brought this matter before the Court promptly*, thereby minimizing the Creditors' reliance on the Confirmed Plan.") (emphasis added).

(or totally) in full. Second, it is the Debtors, not Respondents, who are the primary alleged wrongdoers here as it was *the Debtors* who allegedly did not provide requisite notice to Petitioners and *the Debtors* who allegedly improperly provided Petitioners' photographs to Respondents. Indeed, the bankruptcy cases addressing inadequate notice focus on whether the creditor may pursue *the debtor* (who was responsible for giving notice), either by filing a late claim or by pursuing an undischarged claim or lien, not by pursuing a third party beneficiary of a release. Third, while throughout this litigation Petitioners could have sought to file late claims against the Debtors and, if such claims were meritorious, recover nearly (or totally) in full, Petitioners never sought such relief. Moreover, Petitioners also never sought to facilitate that relief by seeking to stay the Debtors' distributions to creditors or to accelerate the resolution of their Complaint in the Bankruptcy Court. Fourth, Petitioners unreasonably delayed in seeking relief for at least seven months (and perhaps much longer) after receiving actual notice of the Release.

In light of these and other circumstances favoring Respondents, it is inconceivable the Bankruptcy Court ever would have granted relief permitting Petitioners to pursue Respondents, as the District Court noted. *See* Pet. App. at 9a n. 3. In fact, the Bankruptcy Court was cognizant of Petitioners' delay in filing and failure to seek expedited resolution of Petitioners' Complaint. Pet. App. at 17a n. 4, 19a-20a. *See Cotto v. U.S.*, 993 F.2d 274, 280 (1st Cir. 1993) ("[T]here is no valid excuse for having dawdled . . . . Such protracted delay scuttles any claim that plaintiffs'

motion was 'made within a reasonable time.' ") (citation omitted). Even when laches has been held to be unavailable to preclude a claimant from challenging a void judgment, courts emphasize that "our holding is not to be construed as allowing a petitioner to sit on his or her rights," and hold that, although the prior judgment was void, substantive remedies, such as the return of property or money, still would be subject to defenses of waiver or laches. *One Toshiba Color Television*, 213 F.3d at 158. Accordingly, in this action, even in the unlikely event the Release and Injunction ever were declared void, Petitioners would have lost any right to pursue claims against Respondents by reason of waiver and laches as well as the other grounds demonstrated above.

That conclusion is buttressed by the critical importance of finality in bankruptcy cases.[18] Petitioners largely ignore the context of this case, in which Rule 60(b) is made applicable by Bankruptcy Rule 9024. Instead, Petitioners mix bankruptcy cases and non-bankruptcy cases willy-nilly throughout their Petition. Yet, in bankruptcy cases, thousands of parties surrender rights, invest money, and otherwise change their positions in reliance on an order confirming a reorganization plan. In pursuit of their claims,

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[18] Petitioners argue the bankruptcy aspect of this case somehow signifies notice is uniquely important. Yet, notice is always important. What distinguishes bankruptcy cases is the multiple parties involved who act upon a bankruptcy court's confirmation order, rather than a traditional "A vs. B" litigation. Thus, of paramount importance are finality and limitations on remedies that would thwart a reorganization plan already relied on by numerous parties.

Petitioners propose to disrupt a confirmed and largely consummated Plan, after having failed to seek available remedies against the Debtors that could have addressed Petitioners' concerns (if they had valid claims) without prejudicing the many other parties affected by and who acted in reliance on the Plan.[19]

Accordingly, in the bankruptcy context, any potential loss to Petitioners must be weighed against the strong policy considerations favoring finality of confirmation orders, particularly when over $260 million of consideration "vital" to the Debtors' Plan has changed hands irrevocably.[20]

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[19] Ignoring such massive prejudice to others, Petitioners inappropriately argue "[t]he unfairness of the lack of notice in this case is further compounded by the fact that the Release and Injunction purported to extinguish Petitioners' claims against *non-debtors*." Petition at 24 n. 10 (citing *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005)). First, publication notice was given. Second, once Petitioners had actual notice of the Release, Petitioners delayed at least seven months before filing their Complaint and failed to file claims against the Debtors, although Petitioners acknowledge it was the Debtors who were responsible for providing notice and alleged the Debtors provided Petitioners' photographs to Respondents without authorization. Third, over $260 million of consideration was paid on behalf of Respondents to the Debtors to help pay their creditors in full (which could have included Petitioners if they had valid claims). Indeed, those facts, among others, more than justified the non-debtor Release and Injunction under the standard set forth in *Metromedia*.

[20] *See In re 401 E. 89th St. Owners, Inc.*, 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998); *In re Astroglass*, 32 B.R 538, 544 (Bankr. M.D. Tenn. 1983) ("Rule 60 relief is inappropriate when circumstances have so changed that prejudice will result.") (citations omitted); *In re Rideout*, 86 B.R. at 530 (court evaluates alternative remedies for inadequate notice

A-145 (¶ 52); Pet. App. at 15a n. 1. That policy favoring finality in bankruptcy matters is exemplified by section 1144, which precludes an attempt to revoke a confirmation order, even one obtained by fraud, once 180 days have passed. 11 U.S.C. § 1144. Similarly, as noted by the Bankruptcy Court, "Bankruptcy Rule 8002 underscores the importance of finality of a court's order approving a disclosure [statement] or plan of reorganization."[21] Pet. App. at 23a-24a.

Also, when applying Rule 60(b) in bankruptcy cases, "the inclusion of [§ 1141(a)] in the Bankruptcy Code as well as the narrow grounds established under 11 U.S.C. § 1144 for revocation of an order of confirmation supports a *strong presumption in favor of finality*."[22] *In re Poteet Construction Co.*, 122 B.R. 616, 619 (Bankr. S.D. Ga. 1990) (emphasis added). Under Rule 60(b), therefore, Petitioners' "burden of proof requirement extends not only to demonstrate [a] factual basis to support relief but also that harm to movant outweighs [the] necessity for finality in orders of plan confirmation." *Id.*

Thus, as Petitioners have not demonstrated and cannot demonstrate they would be entitled to

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of plan confirmation, applies Rule 60(b), and states that a critical factor "*setting this case apart, is the fact that [the creditors] brought this matter before the Court promptly*, thereby minimizing the Creditors' reliance on the Confirmed Plan") (emphasis added).

[21] Bankruptcy Rule 8002(c)(1)(E) and (F) precludes granting any extension of time to appeal from an order approving a disclosure statement or confirming a plan.

[22] Section 1141(a) provides, *inter alia*, that "the provisions of a confirmed plan bind . . . any creditor [of the debtor] . . . . 11 U.S.C. § 1141(a).

pursue relief against Respondents, Petitioners' request for a writ should be denied.

CONCLUSION

For all of the reasons set forth herein, Respondents respectfully request that the Court decline to grant a writ of certiorari in this matter. Petitioners' asserted basis for granting certiorari was never properly presented to (or decided by) the courts below and, in fact, was expressly disavowed by Petitioners, no genuine conflict exists among the Circuits, and there are several independent bases for dismissal of Petitioners' suit. The courts below reached the correct result, and there are no compelling reasons why the writ should be granted.

Dated: New York, New York
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